UNITED NATIONS

GENERAL ASSEMBLY

Distr.
GENERAL
A/CN.9/413
12 April 1995

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW
Twenty-eighth session
Vienna, 2 - 26 May 1995

CROSS-BORDER INSOLVENCY

Report on UNCITRAL - INSOL Judicial Colloquium on Cross-Border Insolvency

Note by the Secretariat

INTRODUCTION

1. The present note contains a description of the information presented and conclusions drawn at a Judicial Colloquium on Cross-Border Insolvency, held on 22 and 23 March 1995 at Toronto by the Secretariat of the United Nations Commission on International Trade Law and the International Association of Insolvency Practitioners (INSOL). The purpose of the Colloquium was to obtain for the Commission the views of judges, and of Government officials concerned with insolvency legislation, on judicial cooperation in cross-border insolvency cases (hereinafter referred to as "judicial cooperation"), and the related topics of court access for foreign insolvency administrators and recognition of foreign insolvency proceedings (hereinafter referred to as "access and recognition"). The Colloquium was designed to assist the Commission as it embarks on work on those aspects of cross-border insolvency.

2. Over 60 judges and Government officials from thirty-six States took part, representing a broad range of practical experience and the perspectives of diverse legal systems. It provided an opportunity to obtain at a formative stage of the Commission's work the views of those who would be the end-users of a legal instrument devised by the Commission to deal with cross-border insolvency. The Colloquium also provided a unique opportunity for judges to have contact with each other and further their understanding of the various national approaches to dealing with cross-border insolvency cases, a type of contact that has value in itself in furthering judicial cooperation.

3. In connection with its decision to undertake work on those aspects of cross-border insolvency, the Commission had decided at its twenty-seventh session to hold the Colloquium. That decision in turn was taken in the light of views expressed at a first UNCITRAL-INSOL Colloquium (Vienna, 17-19 April 1994), which involved insolvency practitioners from various disciplines, judges, government officials and representatives of other interested sectors including lenders. That Colloquium reported on difficulties currently arising in cases of cross-border insolvency, and the resulting undesirable economic and other effects, both as to asset value available for creditors and the feasibility of saving businesses and employment. It was recommended that the Commission

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could make a useful contribution in a relatively short time with a project specifically designed to facilitate judicial cooperation and access and recognition. It was further suggested that a hearing of the views of judges would be a useful first step, not only in further assessing the desirability and feasibility of such work, but also in gathering the information necessary to initiate work.[1]

UNCITRAL--INSOL JUDICIAL COLLOQUIUM ON CROSS-BORDER INSOLVENCY

A. Background report of expert group

4. The participants at the Judicial Colloquium were aided in their discussion by a background paper on cross-border insolvency prepared by a group of experts assembled by INSOL. That paper will be finalized taking into account the views expressed at the Judicial Colloquium and will be of use in the Commission's work on cross-border insolvency.

5. The paper summarized the current legal environment in which solutions to cases of cross-border insolvency must be crafted. That environment was characterized by diversity and often inconsistency in legal approaches applied in cross-border insolvency, including the degree of discretion that might be available to judges in the absence of statutory authorization. This situation may jeopardize in any given case the possibility of implementing a liquidation or reorganization plan that maximizes the value of the debtor's assets and saves as much employment as is possible. For example, some States adhere to a "territoriality" principle which may deny recognition to foreign insolvency proceedings and assert control over domestic assets, while States in a bilateral or multilateral treaty arrangement might be bound to apply approaches aiming at a single or common administration of the insolvency (e.g., Montevideo Treaties of 1889 and 1940; Nordic Bankruptcy Convention), or at harmonization among any concurrent proceedings.

6. The report described the legislation found in a limited number of States specifically dealing with judicial cooperation, access and recognition in the insolvency context. Typical characteristics or effects of such statutes include: the possibility for a foreign insolvency representative to open secondary or "ancillary" proceedings; the power of the court to stay at the behest of the foreign representative commencement or continuation of actions against the debtor or the debtor's property or to enforce a judgement against the debtor; and the turnover of property of the estate or proceeds of such property to the foreign representative.

7. Such legislation varies in the extent to which cooperation and assistance are mandatory or subject to the discretion of the requested court, as regards both the questions of access and recognition and the degree of cooperation to be given. For example, in one country there is a two-tiered approach, in which recognition and assistance are mandatory for proceedings from certain prescribed countries, based on an assessment as to the nature of the proceedings carried out in those other countries or perhaps other aspects of compatibility of legal systems. For other countries the approach is one of discretion.

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[1] The Commission's current work on cross-border insolvency dates back to a proposal made at the UNCITRAL Congress, "Uniform Commercial Law in the 21st Century", which the Commission decided at its twenty-sixth session to pursue further. The previous deliberations and decisions of the Commission leading up to its current work on cross-border insolvency are reported in A/48/17, paras. 302-306 (twenty-sixth session) and in A/49/17, paras. 215 to 222 (twenty-seventh session). The papers presented to the Commission for its deliberations included A/CN.9/378/Add.4, and A/CN.9/398 (report on UNCITRAL-INSOL Colloquium, Vienna, 17-19 April 1994).

8. Another approach is to authorize cooperation and assistance across the board to all countries, but to leave the actual extent of cooperation and assistance afforded in any given case to the discretion of the court, with the possibility of including in the statute factors to guide exercise of discretion. Those factors include, for example, the just treatment of all creditors, and substantial consistency between legal systems involved as to the distribution of proceeds.

9. Yet another variant mandates assistance to proceedings from prescribed countries, as certified by State officials; the exercise of discretion as to the type of cooperation in individual cases is to be guided in particular by the rules of private international law.

10. Also described were various techniques and notions employed in pursuit of judicial cooperation and access and recognition in particular in the absence of a specific legislative or treaty framework. Those techniques include: application of the doctrine of comity by courts in common law jurisdictions; issuance for equivalent purposes of enabling orders (exequatur) in civil law jurisdictions; conclusion of ad hoc protocols to establish cooperation among jurisdictions involved in a cross-border insolvency case and to facilitate cross-border administration of an insolvency; enforcement of foreign insolvency orders by way of general legislation on recognition of foreign judgments and procedures such as letters of request (letters rogatory) from foreign jurisdictions. Annexures were included in the report containing more detailed descriptions and comparisons of approaches taken in various countries to judicial cooperation and access and recognition.

11. The report made a number of tentative conclusions and recommendations, including: (i) that States should be encouraged to enact in their legislation some basic rules to apply in cases of cross-border insolvency; (ii) recognition should normally follow expeditiously from establishing the basic elements of: the commencement of a valid insolvency proceeding, the control of the business affairs and assets of the debtor, the presence in the foreign jurisdiction of business interests or assets of the debtor or of persons or information relating to the business affairs and assets of the debtor; (iii) the rules on recognition and its consequent effect should foster predictability; (iv) applications for recognition and enforcement should be through judicial processes; (v) an applicant for recognition should not be deemed to have submitted fully to the jurisdiction of the foreign country when appearing in connection with the insolvency; (vi) upon recognition, such cooperation and assistance should be available as is not inconsistent with the law of the foreign country, with the relevant court being given the discretion to provide such aid and assistance as may be appropriate in the circumstances.

B. Judicial Colloquium programme

12. The first portion of the Colloquium was devoted to presentations on six major cases of cross-border insolvency by individuals involved in the cases. The presentations were made by presiding judges from various countries and differing legal systems that presided over proceedings in some of those cases, as well as by insolvency administrators and other court-appointed insolvency officials. That was followed by a presentation of the report, observations of leading academics in the field of insolvency law, and a closing evaluation by a multinational panel of judges. In addition, interspersed in the programme were several open floor segments, which substantially added to the range of experiences and views presented.

13. Views and issues raised at the Colloquium are summarized below, by reference to the principal elements of the work being undertaken by the Commission: judicial cooperation, as well as access and recognition.

1. Judicial cooperation

14. The experiences and views reported at the Colloquium reflected the general willingness and interest of judges to cooperate in cases of cross-border insolvencies. At the same time, judicial cooperation was hindered by disparity or inadequacy of laws regarding judicial cooperation. It was generally felt that a text from UNCITRAL, for example in the form of model legislative provisions, could usefully support extensions of cooperation and assistance by judges from legal systems where such judicial activity would require a statutory authority. Moreover, even in jurisdictions where judges were given broad discretionary power, it had been shown that a legislative framework could provide added predictability as regards resolution of cross-border insolvencies.

15. There was support for exclusion of consumer insolvencies from the scope of the instrument to be prepared by the Commission. It was not intended, however, to limit thereby the scope exclusively to insolvency of legal persons, since there could be cases of individuals conducting economic enterprises of a commercial nature, without the formal garb of a corporate entity. There was less agreement as to whether the legal text to be prepared by the Commission should venture into attempts to harmonize notions such as "claim", "future claimants", and "discharge". A concern was that such attempts might go beyond what was needed to facilitate judicial cooperation and access and recognition, and adversely affect the feasibility and acceptability of the text.

16. Views were expressed in favour of including in cooperation legislation some version of an automatic stay of execution of claims. This would provide at least a minimum period of time to examine the request of the foreign insolvency representative before a liquidation or dismemberment of the insolvent estate. Favourable views were expressed regarding the potential benefits of a judge appointing a neutral third party, for example, to help harmonize concurrent proceedings, to facilitate agreement, mediate disputes and limit polarization among the various parties, and to resolve impediments to reorganization plans.

17. It was reported that communications between judges in cross-border insolvency cases could be particularly useful for clarifying conflicting information, keeping track of foreign proceedings, obtaining explanations of foreign law, and developing insolvency plans and solutions agreeable to parties in both jurisdictions. Various perspectives were presented as to such communications, some favouring a relatively unbridled right of judges to communicate directly, and others favouring varying degrees of restriction and procedure. The suggested restrictions on judicial communications sprang from concerns as to the propriety and fairness of conducting such communications in the absence of the parties. Possible procedural requirements mentioned included a record of the communication, notice to the parties of the communication, or an opportunity for the parties to be present.

18. A suggestion not directly related to the work of UNCITRAL, but one intended to facilitate judicial cooperation, was the establishment of a method of accreditation of insolvency representatives, so as to increase the confidence of judges requested to act by foreign insolvency representatives.

2. Access and recognition

19. A consensus supported the inclusion in the text to be prepared by UNCITRAL of provisions on access and recognition. As to the type of proceedings to be recognized, a view was expressed that the provisions should be limited to proceedings in which the debtor was actually insolvent. The suggestion not to cover voluntary insolvency proceedings and proceedings in which the debtor was left in possession of the assets during the insolvency proceedings, or could be seen as "trading while

insolvent", sought to take into account that such cases were either not recognized universally or were treated differently by States.

20. It was noted that the background paper had proposed a way that might overcome such differences among legal systems, by focusing on the nature of the proceeding rather than on whether the debtor was insolvent. The essential elements of a covered proceeding would include: commencement pursuant to insolvency law; the aim of collective communal benefit of creditors; and effective external control of the management of the business interests and assets of the debtor by an administrator (whether such administrator was an independent administrator or the debtor itself).

21. Other issues suggested for attention in legislative provisions on access and recognition included: providing some enforcement effect to recognition of foreign proceedings; providing for limited appearances by foreign insolvency representatives, that would not submit them to the full jurisdiction of the court; granting equal access to creditors and doing away with automatic priority of local creditors; providing a rule on allocation of primary proceedings, with the effect that all other proceedings would be secondary or ancillary. It was noted that the question of which of these issues to address would be considered bearing in mind the advantages as regards both feasibility and acceptability of developing an instrument that was not overly extensive as to the issues that it attempted to deal with.

CONCLUSIONS

22. The Judicial Colloquium reflected a consensus view that the development by UNCITRAL of a legislative text of limited scope (e.g., in the form of model statutory provisions facilitating judicial cooperation and access and recognition) was both desirable and feasible. The urgency of giving attention to this matter was emphasized in view of the increasing incidence of cross-border insolvency.

23. The Commission may wish at this stage to assign a working group to consider in detail the views and information presented at the Judicial Colloquium. Two working group sessions might be scheduled prior to the twenty-ninth session, taking advantage of the availability of the information gathered in the expert group report and elicited at the colloquia that have been held.

24. The working group could also consider proposals made as to the possible form and content of the Commission's work (e.g., model legislative provisions containing a "menu of options" for legislators, possibly inspired by alternative approaches followed in existing legislation on judicial cooperation and access and recognition; see paras. 6 to 9).

25. Such a method would present to States various possible approaches that they may wish to adopt with respect to the two basic questions of: access and recognition of a foreign insolvency representative, on the one hand, and, on the other, the determination of the degree of cooperation to be extended in any given case. On the question of access, one approach, for example, would be to have mandatory access with respect to proceedings from prescribed countries, based on an assessment of factors such as compatibility of legal systems, with discretionary access as regards proceedings from other countries. Another approach would be discretionary with respect to all countries. An additional layer of options presented to States would concern the scope of the types of measures possibly to be granted in support of foreign proceedings, and the conditions to be met to obtain those measures.

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